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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re KIMBERLY R., a Person Coming Under
the Juvenile Court Law.

KINGS COUNTY HUMAN SERVICES
AGENCY,

Plaintiff and Respondent,

v.

GINA R.,

Defendant and Appellant.

F072221

(Super. Ct. No. 07JD0036)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. Jennifer L. Giuliani, Judge.

Leslie A. Barry, under appointment by the Court of Appeal, for Defendant and Appellant.

Colleen Carlson, County Counsel, and Rise A. Donlon, Deputy County Counsel, for Plaintiff and Respondent.

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* Before Hill, P.J., Franson, J. and Peña, J.

Appellant Gina R. (mother)¹ appeals from the juvenile court's order terminating her parental rights as to her one-year-old daughter Kimberly R. (the minor). On appeal, mother contends the juvenile court abused its discretion in denying her Welfare and Institutions Code section 388² petition seeking reinstatement of reunification or family maintenance services. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2014, the Kings County Human Services Agency (agency) received a referral reporting that, at the time of the minor's birth, both mother and the minor tested positive for amphetamines, methamphetamines, and marijuana. During her pregnancy, mother had two prenatal appointments and tested positive for drugs at each of them. Mother also admitted to abusing drugs throughout her pregnancy and using drugs two days prior to giving birth to the minor.

The juvenile court ordered the minor detained and the agency referred mother for services. Shortly thereafter, mother entered an inpatient substance abuse treatment program at Hannah's House and started participating in other services, including substance abuse treatment and parenting classes through Champion, and attending "AA/NA" meetings.

The juvenile court took jurisdiction over the minor in April 2014, and ordered reunification services for mother. The court then set a six-month review hearing for September 22, 2014.

By the time of the six-month review hearing, mother had made such significant progress that the agency recommended the juvenile court terminate reunification services and order family maintenance services for mother. The agency reported that in early

¹ In this opinion, certain persons are identified by abbreviated names and/or by status in accordance with our Supreme Court's policy regarding protective nondisclosure. No disrespect is intended.

² Further statutory references are to the Welfare and Institutions Code.

September 2014, after completing the transitional living program at Hannah's House, mother moved into the home of her sister and her sister's significant other, who had been serving as the minor's caregivers.

At the six-month review hearing, the juvenile court adopted the agency's recommendations and granted mother family maintenance services after finding that return of the minor to mother would not be detrimental to the child in that mother had made substantial progress in her court-ordered case plan and had maintained her sobriety.

On February 10, 2015, the agency filed a supplemental petition alleging that mother had been ineffective in providing for the safety and protection of the minor in that she abused alcohol while caring for the minor. A few days earlier, the agency received and substantiated a referral alleging that it was mother's birthday and she had gone on a drinking binge while the minor was in her care.

On April, 7, 2015, the juvenile court sustained the allegations in the supplemental petition, terminated mother's reunification services, and set a section 366.26 hearing for July 28, 2015.

On July 16, 2015, the agency filed a report for the section 366.26 hearing recommending that the juvenile court terminate parental rights and order a permanent plan of adoption for the minor. The agency reported that the minor was currently residing with her maternal aunt and her significant other (the prospective adoptive parents), who were both committed to providing a permanent, adoptive home for the minor.

The agency further reported that the prospective adoptive parents had helped care for the minor since her birth in February 2014, and the minor called them "mama" and "papa." The prospective adoptive parents shared a secure emotional attachment with the minor, which continued to grow, and they were emotionally and financially able to meet the minor's needs.

In addition, the agency reported that the prospective adoptive parents had been together for 14 years, planned to get married, and had a biological child of their own who was born in August 2014. The prospective adoptive parents loved the minor and loved having her in their home. They also helped raise mother's older daughters and did not want to see the minor go through what her sisters went through with mother.

On July 28, 2015, the matter was set for a contested hearing and continued to August 18, 2015.

On August 14, 2015, mother filed a section 388 petition to change the court's previous order setting a section 366.26 hearing. The petition set forth the following allegations in support of the requested change:

“...Since the last hearing [mother] has completed the AOD outpatient treatment program at Champions. She has also completed the Celebrating Families program. She has also attended the required AA meetings as shown by the attached signature cards. [Mother] was not offered reunification services in regard to this child. She engaged and completed these services on her own.

“...It would be in the best interests of the child for the court to order Family Reunification or Family Maintenance services. In this case [Mother] was ‘bypassed’ but has demonstrated that she can complete the required services within the next 6 months. She can now provide a stable loving and drug free home for the minor.”

Mother's section 388 petition was heard at the same time as the section 366.26 hearing on August 18, 2015. The agency called mother and the adoptions social worker as witnesses.

Mother testified that she had two older daughters who were in a legal guardianship with their maternal grandmother, and that the guardianship was not the result of a court action with child protective services (CPS). Mother explained that she had moved out of the grandmother's home because mother had been in a relationship with which the grandmother did not agree. Rather than taking the children with her, mother decided to have them stay with their grandmother where they were comfortable.

Mother testified she started using methamphetamine when she was 12 years old. Her longest period of sobriety from methamphetamine use lasted about two years between 2007 and 2009, after she gave birth to her second daughter. A CPS case was opened at that time because mother had tested positive for drugs at the time of the child's birth. After the two-year period of sobriety, mother went back to using methamphetamine in 2009.

Mother acknowledged that the minor had lived with her sister, the prospective adoptive mother, since the time of the minor's birth and testified there was "a great bond" between her sister and the minor. During the six-month period when mother was on a family maintenance plan, between September 2014 and February 2015, she lived with the minor and cared for the minor in her sister's home, which, as far as the minor knew, was the minor's home.

During examination by mother's counsel, mother described the various services she had completed and testified that, after the minor was removed for the second time, she completed a drug rehabilitation program and attended both individual and group therapy. Mother acknowledged that she had previously used methamphetamine "off and on" for a period of 18 years but testified she would not relapse this time because she had learned through the rehabilitation program what her "triggers" were for drug use and how to avoid them. Mother was now attending AA/NA meetings and was actually the treasurer of the Monday night meeting in Lemoore. Mother recently enrolled in an online college to become a drug and alcohol counselor and was going to be an intern at Champions.

Mother testified she was the minor's primary caregiver during the six-month period they lived together and the minor called her "mom." The minor looked upon her as a parent and continued to call her "mom" at visits and was very attached to her.

The adoptions social worker testified that she had observed the minor in her prospective adoptive home, when she was playing with her foster sister. The minor was

healthy, very happy and active, and very comfortable in her home. Her caregivers were committed to adopting her, but, if for some reason, the adoption fell through, it would not be difficult to place the minor in another home.

After listening to the arguments of counsel, the juvenile court denied mother's section 388 petition, explaining that, despite mother's commendable progress, the court could only find her circumstances were "changing and not changed." But even if the court could find mother changed her circumstances, the court was unable to make a finding that granting the petition would be in the minor's best interest. The court then adopted the agency's recommendation to terminate parental rights and order a permanent plan of adoption.

DISCUSSION

Mother's sole contention on appeal is that the juvenile court abused its discretion in denying her section 388 petition. She does not raise any issues regarding the termination of her parental rights. We find no error.

A petition to modify a juvenile court order under section 388 must allege facts showing that new evidence or changed circumstances exist, and that changing the order will serve the child's best interests. (§ 388, subd. (a).) The petitioner has the burden of proof by a preponderance of the evidence. (Cal. Rules of Court, rule 5.570(h)(1)(C).) In assessing the petition, the court may consider the entire history of the case. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189.)

We review the denial of a section 388 petition after an evidentiary hearing for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) Where there is conflicting evidence, we reverse only if the evidence compels a finding for the appellant as a matter of law. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527–1529.)

The best interests of the child are of paramount consideration when, as here, a section 388 petition is brought *after* termination of reunification services. (*In re Stephanie M., supra*, 7 Cal.4th at p. 317.) In assessing the best interests of the child at

this juncture, the juvenile court's focus is on the needs of the child for permanence and stability rather than the parent's interests in reunification. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) "A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) "[W]hen a child has been placed in foster care because of parental neglect or incapacity, after an extended period of foster care, it is within the court's discretion to decide that a child's interest in stability has come to outweigh the natural parent's interest in the care, custody and companionship of the child." (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419.)

The "escape mechanism" provided by section 388 after reunification efforts have ceased is only available when a parent has completed a reformation before parental rights have been terminated. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528.) This is because, if a parent's circumstances have not changed sufficiently to permit placement of the child with that parent, reopening reunification "does not promote stability for the child or the child's best interests" when the child is otherwise adoptable. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 47.)

Here, the juvenile court found that although mother's circumstances were changing, they had not yet changed. At the time of the contested hearing, mother had, as the court observed, made commendable efforts toward recovery by, among other things, completing an outpatient treatment program and becoming an active participant and leader in her 12-step program. However, these efforts were relatively recent in contrast with her 18-year history of methamphetamine use. Although mother had been testing negative for methamphetamine for the past 18 months, her long history of drug abuse included a period of abstinence of similar length, between 2007 and 2009, which had been followed by relapse into regular methamphetamine use, abdication of responsibility

for parenting her older daughters, and the minor's removal in 2014, after testing positive for methamphetamine and other drugs at the time of her birth. While mother attempts to downplay her relapse into alcohol use and intoxication on her birthday in February 2015, the record significantly reflects that mother relapsed after mother had already received a year's worth of services and while she was living in the supportive environment of her sister's house. On the record before it, the juvenile court's finding of "changing" as opposed to "changed" circumstances, in light of mother's relatively brief recovery, was well with the juvenile court's discretion.

However, even assuming the juvenile court erred in failing to find mother changed her circumstances, the court properly denied the section 388 petition because mother did not meet her burden of showing that granting the petition was in the minor's best interests. The agency's reports and the testimony of the adoptions social worker established that the minor was bonded not only with her prospective adoptive parents, whom she called mama and papa, but also with their daughter, who was close to the minor in age, and with whom the minor had positive and appropriate interactions. Mother's testimony that the minor called her mom and appeared attached to her during visits was not sufficient to prove that reopening reunification or family maintenance services was in the best interests of the minor, who, by all accounts, had found a stable and loving home with the prospective adoptive parents in whose home she has lived her entire young life.

We conclude, based on the foregoing, the juvenile court properly exercised its discretion in denying mother's section 388 petition and affirm the order terminating her parental rights.

DISPOSITION

The order terminating mother's parental rights is affirmed.